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COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 29th MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations on Thursday, 9 July 1998, at 10.15 a.m.

Chairman: Mr. P. KIRSCH (Canada)
later: Mr. MOCHOCHOKO (Lesotho) (Vice-Chairman)

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The meeting was called to order at 10.15 a.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (*continued*) (A/CONF.183/2/Add.1; A/CONF.183/C.1/L.53)

1. **The CHAIRMAN** invited the Committee to take up the second set of questions in discussion paper A/CONF.183/C.1/L.53, on other jurisdictional issues, admissibility and applicable law.

2. **Mr. KOURULA** (Finland), Coordinator, said that practically the same order of provisions was followed in the discussion paper as in the draft Statute. As to the exercise of jurisdiction, three triggering mechanisms were provided in the discussion paper. With respect to the Prosecutor's right to initiate an investigation, there were two options in article 6 and two in article 12. On the basis of earlier debate in the Committee of the Whole, the term "situation" was used in article 6.

3. In article 7, covering preconditions to the exercise of jurisdiction, and automatic jurisdiction, it might have been preferable to reverse the order of paragraphs 1 and 2. The existing order had probably been chosen because paragraph 1 might apply both to article 7 (2) and to possible "opt-in" jurisdiction. The article governed preconditions to the exercise of jurisdiction, if needed. Furthermore, as the note in bold type stated, if the Statute were to provide for automatic jurisdiction for some crimes but an "opt-in" or "State consent" regime for others, then consequential amendments to paragraph 1 would be required, and the placement of subsequent provisions would be reconsidered.

4. Article 7 (2) dealt with automatic jurisdiction, while elements for the "opt-in" mode were contained in article 7 *bis*. Article 7 *ter* contained a provision concerning the acceptance of the jurisdiction of the Court by a non-party.

5. On the issues relating to the Security Council, he recalled that the Committee had already discussed the question of aggression and would have to deal with coordination between the Court and Security Council action.

6. Article 11, "Referral of a situation by a State", was a technical issue.

7. Consultations continued on the issues pertaining to admissibility, especially with respect to article 16.

8. With regard to article 20, a special working group had been established on the previous day to consider issues that remained open.

9. **The CHAIRMAN** said that the Bureau had requested comments on the following issues:

(1) Acceptance of jurisdiction; automatic jurisdiction; opt-in or State consent for one or more core crimes;

(2) What States must be party to the Statute or had to have accepted jurisdiction before the Court exercised jurisdiction;

(3) An approach to the *proprio motu* power of the Prosecutor to initiate proceedings and the safeguards required;

(4) An approach to the role of the Security Council on issues other than aggression that could form the basis for general agreement.

It would not be useful to go into article 20 at the current meeting, since it was being discussed by the working group just established.

10. Delegations were invited to make other suggestions, which, he hoped, would be helpful in reaching general agreement.

11. **Ms. WILMSHURST** (United Kingdom) said that, with respect to the Chairman's first question, the United Kingdom strongly believed that there should be automatic jurisdiction: if a State became a party to the Statute, it should thereby accept the Court's jurisdiction on all the core crimes within the Court's remit. She assumed that treaty crimes would not be included.

12. On the second point, namely, the difficult question of non-parties, she said that her delegation still believed that its own proposal (option 2 for article 7 in the discussion paper) could achieve consensus.

13. On the question of the Prosecutor, her delegation was in favour of provisions that would support and protect his or her independence and the authority of the office. Appropriate checks and balances should therefore be included to afford such protection as States might require in the light of all the provisions of the Statute, including the principle of complementarity. Her delegation was prepared to work on provisions to meet those objectives.

14. With regard to the role of the Security Council, her delegation believed that the only sensible course would be to allow the Council to refer cases to the Court, since the establishment by the Council of new ad hoc tribunals should be avoided. With regard to deferral by the Court on request of the Council, her delegation considered that some such provision as option 1 in article 10 (2) would be a good solution.

15. With regard to the issue of complementarity under article 15, she hoped that the current wording of that article could be retained in view of the difficult negotiations that had taken place in the Preparatory Committee.

16. **Mr. PERRIN DE BRICHAMBAUT** (France) said that his delegation had two considerations in mind with regard to the Chairman's four questions. First, the Court should have the widest possible membership. Since a variety of situations existed in different States and not all States were ready to accept the Court's inherent jurisdiction over their nationals for all crimes, a way had to be found of allowing the greatest possible number to participate.

17. Second, the Court would be successful if it worked in a spirit of harmony and trust with existing international institutions, particularly the Security Council. It was therefore important to look again at the methods of cooperation set out in the Statute.

18. In reply to the Chairman's first question, he said that France believed that the Court should have mandatory jurisdiction for all States parties with regard to genocide, crimes against humanity and aggression. For war crimes, consent by the State of which the accused was a national would be preferable. A flexible system allowing each State to accept the Court's jurisdiction for a given crime would meet the concern of his and other delegations. His delegation would therefore propose an additional paragraph to article 7 *bis* to cover that point.

19. Regarding the Chairman's second question, his delegation was in favour of a compromise solution combining parts of options 1, 2 and 4 for article 7.

20. With regard to the role of the Prosecutor, France had already agreed to the idea of referral to the Court by joint decision of the Pre-Trial Chamber and the Prosecutor, which was reflected in option 1 for article 12.

21. On the role of the Security Council, his delegation was in favour of option 1 for article 10 (1) and for 10 (2). The Security Council's prerogatives under the Charter to determine acts of aggression had to be respected, while at the same time the action of the Court and that of the Security Council had to be consistent in situations where there was a threat to or breach of the peace.

22. **Mr. BROWN** (Trinidad and Tobago) said that automatic jurisdiction for all core crimes was absolutely essential. It might be supplemented by opt-in jurisdiction over treaty crimes such as drug trafficking.

23. As to the preconditions for the exercise of jurisdiction under article 7, his delegation considered that option 1 was the best of those presented in the discussion paper, although it would have preferred the universal jurisdiction formula proposed by the German delegation.

24. His delegation strongly supported the power of the Prosecutor to initiate investigations *proprio motu* and therefore preferred option 2 in article 6 (c). Adequate safeguards would be provided by the Pre-Trial Chamber under article 12, option 1, article 17 and article 58.

25. Trinidad and Tobago accepted that the Charter recognized the Security Council's role in dealing with aggression, but sympathized with the view that there was no need for an exclusive role of the Council. His delegation supported the Council's right to refer situations to the Court under article 6 (b), but wondered whether the General Assembly should not be granted similar authority as well, since a State party had that right under article 6 (a).

26. His delegation could accept that the Security Council, acting under Chapter VII of the Charter, might need to request a temporary suspension of an investigation or prosecution by the Court under extraordinary circumstances. However, such suspensions should be limited to a period of six months and be renewable only once.

27. **Mr. CAFLISCH** (Switzerland), replying to the Chairman's first question, said that the Court's jurisdiction over all core crimes must be automatic. His delegation considered option 1 for article 7 to be an acceptable compromise.

28. As to what States had to be parties to the Statute if the jurisdiction of the Court was to be established in a given case, in his delegation's view that requirement should apply to the State where the suspect was located rather than to the custodial State, because a suspect could be located in a State but not in custody. However, for the sake of compromise, he could accept option 1 for article 7.

29. With regard to the role of the Prosecutor, his delegation supported option 1 for article 12. To prevent any possible abuse, the independent exercise of the Prosector's activities might be subject to control by the Pre-Trial Chamber.

30. With regard to the Security Council's role on issues other than aggression, his delegation considered that the Council should never serve as a filter to prevent matters from being referred to the Court. Nor should the Prosecutor be obliged to notify the Council whenever a State submitted a case to the Court. However, the Council might well

wish the Court to defer consideration of a case for a certain period, but that period should not be too long and should not be used to remove or destroy evidence.

31. His delegation could therefore accept option 2 for article 10.

32. **Mr. OWADA** (Japan), replying to the Chairman's first question, said that Japan considered that the Court's jurisdiction should be confined to core crimes but should be automatic. Treaty crimes should not be covered by the Statute and his delegation was therefore not in favour of the system set out in article 7 *bis*. None the less, his delegation would try to promote general agreement on that matter since it was important to achieve the widest possible participation in the Statute.

33. His delegation had no objection to article 7 *ter*, which set out the guiding principle for acceptance of jurisdiction.

34. With regard to the second question, Japan considered it important to have the cooperation of the custodial State and also that of the State on whose territory the act or omission had occurred. It was therefore in favour of option 3 but was prepared to listen further to the views of other delegations.

35. Concerning the power of the Prosecutor to initiate investigations *proprio motu*, Japan considered it important that the Prosecutor should act strictly in accordance with the law and that he or she should be totally free from any influence by a country or group. However, the Court's Prosecutor would not be like a prosecutor in a national judicial system, who had legitimacy backed by accountability under that system. In the international context, the Prosecutor had to reflect the legal interest of the international community, and it was therefore important to provide a mechanism ensuring the legitimacy of his or her action. Bearing those considerations in mind, Japan would continue to seek a formula acceptable to all.

36. His delegation was in favour of option 1 for article 10, with regard to both aggression and deferral.

37. **Ms. FERNANDEZ de GURMENDI** (Argentina) said that her delegation considered that the Court should have automatic jurisdiction over all crimes within its jurisdiction: genocide, crimes against humanity, war crimes and the crime of aggression, if the latter was included. Any system of opt-in or State consent would undermine the Court's independence and effectiveness.

38. As to what States had to be parties to the Statute, her delegation preferred option 1 for article 7.

39. Her delegation was in favour of giving the Prosecutor power to initiate proceedings *proprio motu*, and of the system of Pre-Trial Chamber control set out in article 12.

40. Her delegation believed the Council's ability to submit issues to the Court to be important. With regard to the question of deferral, her delegation considered that option 1 in article 10 (2) provided a good basis for compromise.

41. **Mr. SCHEFFER** (United States of America) said that his delegation strongly supported option 2 for article 6 for reasons already explained. Option 1 would weaken the Court in practice and would discourage many Governments from joining it.

42. If the principle of universal jurisdiction were adopted, many Governments would never sign the treaty and the United States would have to actively oppose the Court. The principle of universal jurisdiction was not accepted in

the practice of most Governments and, if adopted for the Statute, would erode the fundamental principles of treaty law. The possibility that the Court might prosecute the officials of a State that was not a party to the treaty or had not submitted to the Court's jurisdiction in other ways was a form of extraterritorial jurisdiction that would be quite unorthodox. His delegation therefore rejected options 1, 2 and 3 for article 7 and strongly supported option 4, which required the prior consent of the State of nationality of the accused if that State was not a party to the treaty. The United States had grave difficulties with establishing a court that presumed to have jurisdiction over the citizens of a State that had not ratified the treaty creating it, except in situations where the Security Council had taken enforcement action under Chapter VII of the Charter, which was binding on all Member States. Options 1, 2 and 3 did, however, contain elements that could be added to option 4 if desired.

43. With respect to automatic jurisdiction, his delegation believed that any State party to the Statute should, by virtue of its ratification of the treaty, accept the Court's jurisdiction over genocide. The crime mentioned in article 7 (2) should therefore be "genocide". Automatic jurisdiction over all the core crimes was a recipe for limited participation in the Court. A better solution might be an opt-in provision to allow States parties to accept the Court's jurisdiction over crimes against humanity and war crimes, as proposed in article 7 *bis*. That approach would encourage broad membership in the Court. Moreover, the principle of complementarity should apply with respect to all crimes within the Court's jurisdiction.

44. Article 7 *ter* was a useful and necessary provision.

45. His delegation strongly supported article 8 (1 *bis*), without which many States would be reluctant to join the treaty.

46. With respect to article 10 (1), his delegation considered that option 1 was essential. Contrary to some suggestions, the General Assembly was not equivalent to the Security Council as far as the Council's responsibilities under the Charter were concerned.

47. His delegation had long supported the proposal in the original International Law Commission (ILC) text requiring affirmative action by the Security Council before a complaint concerning a matter under consideration by the Council could be addressed by the Court. However, it realized that a consensus was unlikely on that point.

48. His delegation was examining wording that might better achieve the objective of section 2 of article 10. In view of the Council's responsibilities under the Charter for restoring and maintaining international peace and security, recognition of its role in the Statute was vital to the proper functioning of the Court, in accordance with the obligations of Member States under the Charter. His delegation was willing to work with others to find a compromise with respect to the Council's proper role, but the powers and functions of the Council must not be rewritten. Wording was needed that did not impose an obligation on the Council to draft its own resolution with a specified period for its applicability. Nevertheless, his delegation supported efforts to find consensus.

49. With respect to article 11, his delegation believed that option 1 for paragraph 3 was a necessary provision for coordination between the Court and the Security Council.

50. His delegation supported the deletion of article 12.

51. The United States delegation had already explained its proposal regarding article 16, and was prepared to review it with other delegations so that the text could be finalized. That was a relatively minimal proposal but would encourage broader membership in the Court because it strengthened the principle of complementarity.

52. If the approaches he had suggested made up an acceptable package, his delegation would seriously consider recommending that his Government should sign the treaty at an appropriate time in the future.

53. **Mr. MEDDAH** (Morocco) said that his delegation had no problem with including genocide, crimes against humanity and war crimes within the jurisdiction of the Court.

54. Aggression was political in nature and had not been clearly defined. It should therefore be excluded from the Court's jurisdiction, and the same applied to other crimes which were not of extreme gravity. To ensure that the Court could be independent and effective, the Prosecutor should be given all powers to carry out his or her responsibilities effectively and should be subject to no control other than that of the Statute and the Court itself.

55. **Ms. VARGAS** (Colombia) said that her delegation supported automatic jurisdiction for genocide, war crimes and crimes again humanity. If consensus was reached on the inclusion of treaty crimes, an express declaration of acceptance of the Court's jurisdiction would be necessary.

56. Her delegation was in favour of option 3 for article 7 regarding States that should be parties or have accepted jurisdiction before the Court exercised its jurisdiction. In other words, both the territorial State and the custodial State must have accepted the Court's jurisdiction, but, as a compromise, she could agree to a combination of options 3 and 4, thus including the State of nationality of the accused.

57. With regard to the power of the Prosecutor to initiate proceedings, her delegation supported article 12, which provided for control by the Pre-Trial Chamber.

58. As to the Security Council's role on issues other than aggression, she reiterated her country's position that the Council should not intervene in the functioning of the Court.

59. **Mr. DABOR** (Sierra Leone), speaking in connection with article 6, said that his delegation considered it imperative that the Prosecutor should be able to initiate investigations and was therefore in favour of option 1 for article 6 (c). With regard to article 12, his delegation's preference was for option 1.

60. On article 7, his delegation considered that the Court should have automatic jurisdiction over all the core crimes. It regretted that universal jurisdiction had been eliminated from the choices. Paragraph 2 of article 7 should become paragraph 1 and the word "of" should be deleted, so that paragraph would read: "A State which becomes Party to the Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5". His delegation preferred option 1 for article 7 because it was selective rather than cumulative.

61. His delegation called for the deletion of article 7 *bis*, because there should be no opt-in for core crimes. It did not consider that treaty crimes should be included at that time, so that an opt-in system with regard to those crimes would be unnecessary.

62. His delegation was in favour of including article 7 *ter* since it would allow non-parties to cede their jurisdiction to the Court when a crime of the most serious concern to the world community had been committed.

63. Referring to the role of the Security Council, he said that his delegation would prefer option 2 for paragraph 2 of article 10 if the deferral period was shorter, namely, six months rather than twelve. Moreover, a revised version should make provision for the concerns of Belgium about the preservation of evidence; the term "evidence" should be interpreted broadly enough to cover witness and victim protection. His delegation considered that the deferral

request should be renewable only twice if it was for a duration of six months, or once if it remained at twelve. Numerous renewals or indeterminate delays might subject accused persons to lengthy detention prior to or during a trial, and would thus prejudice the right to a fair trial. His delegation also supported the New Zealand proposal that any decision for deferral be taken by a formal resolution of the Security Council. However, in a spirit of compromise, his delegation would adopt a flexible attitude on option 1 and would welcome further consultations on the issue.

64. In connection with article 11 (3), his delegation would prefer that there should be no direct interference by the Security Council in the proceedings of the Court. Option 1 might be understandable if the Court were to be an organ of the United Nations, but as a treaty-based organization, notification to the Council was inappropriate; option 2 was therefore preferable.

65. With regard to article 15, his delegation preferred that the text should remain as it stood, since it was the result of a very delicate compromise.

66. His delegation was against the inclusion of article 16, which merely set up another procedural obstacle to the operation of the Court. Taken as a whole, articles 15, 16 and the possibility of an article 17 would create a system full of checks without any balance. His delegation therefore considered that, if article 16 were included, there must be automatic jurisdiction over the core crimes and the article would need serious improvement.

67. Article 19 raised an important issue and should be included in the Statute. However, in the interests of compromise, his delegation would agree to its deletion.

68. **Mr. GADYROV** (Azerbaijan) said that, in principle, he favoured automatic jurisdiction but, if a particular State or group of States were allowed to select several modes of jurisdiction, his Government would reserve the right to choose the conditions under which it would accept the jurisdiction of the Court, if at all.

69. Genocide, crimes against humanity and war crimes should be subject to automatic jurisdiction. However, if there was agreement in favour of opt-in jurisdiction, his Government would again reserve the right to select the conditions under which it would accept jurisdiction with regard to a particular crime. If treaty crimes were to be included in the Statute, they should be subject to opt-in jurisdiction.

70. His delegation was in favour of option 1 for article 7 (1).

71. His delegation was not in favour of *proprio motu* powers for the Prosecutor and considered that the article in question should be deleted. It was not sufficient to argue that the Statutes of the Criminal Tribunals for the Former Yugoslavia and Rwanda already provided for such *proprio motu* powers. On that analogy, the Statutes of those Tribunals were applied retroactively and the Statute might be so as well, but surely no delegation would accept that.

72. He considered that the Security Council should have the power to refer a situation to the Court, and not only in connection with aggression.

73. As far as deferral was concerned, option 1 for article 10 (2) was not appropriately formulated. A twelve-month period seemed too long. Moreover, his delegation did not favour renewal of the request by the Council.

74. **Ms. LI Yanduan** (China) said that her delegation had always maintained its reservations on an automatic jurisdiction provision, which would not encourage States to accede to the Statute.

75. Under customary international law, the three core crimes did not all have the same status. Whereas genocide was accepted by the whole international community as a crime, crimes against humanity and war crimes fell into a different category.

76. With regard to jurisdiction, she said that the effectiveness of the Court would depend entirely on the cooperation of States, and that the consent of the interested parties was therefore essential. Her delegation considered, with respect to article 7, that the Court might exercise its jurisdiction if the territorial State, the custodial State and the State of which the accused of the crime was a national were parties to the Statute.

77. With regard to option 3 for article 7, her delegation hoped that the provision provided for in the ILC draft could be kept intact.

78. As far as the powers of the Prosecutor were concerned, her delegation was unable to accept the current provisions of article 12.

79. With respect to article 6 (c), her delegation was in favour of option 2.

80. She considered that the Security Council should be empowered to refer cases to the Court. With respect to the Security Council's power of deferral, her delegation was in favour of option 2.

81. **Mr. ROWE** (Australia) said that his delegation was in favour of automatic jurisdiction and therefore did not support article 7 *bis*.

82. On the question of what States should be States parties or should have accepted the Court's jurisdiction before the Court could act in a particular case, his delegation was in favour of option 1 for article 7. Since that option entailed the acceptance of jurisdiction by non-parties, his delegation also supported article 7 *ter*.

83. He strongly supported *proprio motu* powers for the Prosecutor, subject to appropriate safeguards. He supported option 1 for article 12, which met that requirement, and also option 1 for article 6 (c).

84. With regard to the role of the Security Council, the Statute should strike a balance between the need for independent action by the Court, free from any political influence, and the need to recognize the Council's role in relation to the maintenance of international peace and security under Chapter VII of the Charter. That balance was adequately recognized in article 6, which provided for referral by the Council acting under Chapter VII. With regard to option 1 for article 10 (2) relating to deferral, he said that, to give the Security Council any greater power in relation to the operation of the Court would unacceptably compromise the Court's independence.

85. On the question of complementarity, his delegation considered that article 15 should be retained in its current form, since it represented a carefully crafted compromise.

86. **Mr. van BOVEN** (Netherlands) said that his delegation considered it essential that States that ratified the Statute should also accept the automatic jurisdiction of the Court with regard to the core crimes. It therefore did not agree with the opt-in/opt-out modalities or consent regimes as presented in article 7 *bis*.

87. With regard to the preconditions for the exercise of jurisdiction, his delegation considered that the core crimes would warrant universal jurisdiction. However, since that option was not mentioned in the discussion paper, his delegation would favour option 1 for article 7, which came closest to its views on the subject.

88. His delegation considered the *proprio motu* powers of the Prosecutor mentioned in article 6 (c) and elaborated in article 12 to be essential. Moreover, the elaboration in article 12 of the review function of the Pre-Trial Chamber was highly commendable.

89. He considered that the Security Council should be able to refer situations to the Court, as provided for in article 6 (b). He agreed with the Swiss representative that, in connection with article 10, the Council should not have a filter function. He did, however, recognize that in certain instances the Council might have a legitimate interest in the type of issues before the Court. The proposal in option 1 for article 10 (2) was therefore acceptable, although the wording needed clarification and it should be specified that the request by the Council to the Court should be made in a publicly-adopted resolution.

90. His delegation supported the proposed Belgian amendment that the rights of the Prosecutor to take the necessary measures to preserve evidence should not be affected when an investigation or prosecution was suspended.

91. **Mr. WENAWESER** (Liechtenstein) said that his delegation considered that every State that became a party to the Statute should thereby accept the Court's jurisdiction in respect of the crimes set out in article 5. Automatic jurisdiction was absolutely essential for the Court's effectiveness and independence, but should initially be limited to the core crimes. Article 7 *bis* was therefore unnecessary.

92. Since the option based on universal jurisdiction that had been favoured by many States no longer appeared in the discussion paper, his delegation considered that option 1 of article 7 on acceptance offered a good basis for compromise.

93. Regarding the Prosecutor's *proprio motu* powers, his delegation was in favour of option 1 for article 12, providing for the Prosecutor's power to initiate investigations on the basis of information from reliable sources. That power was a constituent of a truly independent Court and was of paramount importance.

94. With regard to the role of the Security Council on matters other than aggression, his delegation thought that the Council should have the power, under Chapter VII of the Charter, to refer a situation to the Prosecutor as provided for in article 6 (b).

95. As far as article 10 (2) was concerned, option 1 provided a sound basis for a compromise; his delegation supported the proposal to include wording on the securing of evidence in that provision. In any discussion on the role of the Council, the Court's independence should be the guiding principle.

96. He supported retention of the language in article 15, which reflected a very delicate and carefully drafted compromise.

97. **Mr. PAL** (India) said that he could endorse almost everything that the United States representative had said. Since the aim was to achieve almost universal acceptance of the Statute, automatic jurisdiction was not the way forward. The opt-in provision in article 7 *bis* was the only acceptable one.

98. As to what States had to be parties to the Statute or to have accepted its jurisdiction before the Court could proceed, his delegation considered it essential that both the territorial State and the custodial State should be States parties and should have accepted jurisdiction; he would therefore prefer option 3 for article 7.

99. His delegation could not accept a *proprio motu* power for the Prosecutor, because it considered that the Court could act only on referral from a State party. Therefore he could not agree to article 6 (c) or to article 12 as a whole.

100. It was on the role of the Security Council that his delegation disagreed with that of the United States, since it considered that the Statute could neither add to nor detract from the powers of the Council under the Charter. The Court's independence could not be preserved if it could act only after the Council had referred a matter to it. The Council's powers would in any case be preserved by the Charter and there should be no reference to the Security Council in the Statute.

101. He pointed out that an anomalous situation might arise, in violation of the law of treaties, when a non-party to the Statute, as a member of the Council, could influence a Council resolution affecting another non-party.

102. Complementarity must be the basis on which the Court should act. In his delegation's view, articles 15 and 16 were needed in the Statute. Both should be strengthened and his delegation would be pleased to embark upon that exercise in cooperation with others.

103. **Mr. MUSSAVOU MOUSSAVOU** (Gabon) said that the Court's jurisdiction for all crimes under article 5 should be automatic for States parties. The possibility of allowing States parties to take measures affecting non-parties might run counter to the law of treaties. His delegation therefore preferred option 4 for article 7, but would favour a combination of options 1, 2 and 4.

104. His delegation considered that the Prosecutor should be able to initiate proceedings *proprio motu*, but with judicial control by the Pre-Trial Chamber to obviate the possibility of abuse, and therefore preferred option 1 for article 12.

105. With regard to the role of the Security Council, his delegation agreed that the Council had the power to refer situations to the Court under the Charter. As to its role on issues other than aggression, his delegation had a preference for option 3 for article 10, though option 2 might provide an acceptable basis for compromise as long as measures were taken to protect witnesses and preserve evidence if there was any deferral. However, the Council should not have the power to defer consideration of a case by the Court for more than six months.

106. **Mr. MACKAY** (New Zealand) said that his delegation believed that automatic jurisdiction over all crimes was essential if the Court was to be effective. It did not support article 7 *bis*.

107. As to what States must be parties or accept jurisdiction, his delegation supported option 1 for article 7, which was already a compromise. The other options in that article were too limiting.

108. His delegation considered it essential for the Prosecutor to have *proprio motu* powers. However, in view of the concerns of others, his delegation was in favour of the safeguards provided in option 1 for article 12, which it hoped would go some way towards meeting those concerns.

109. With regard to the role of the Security Council, his delegation could accept option 1 regarding aggression for article 10.

110. It could accept option 1 on deferral and in that connection welcomed the statement made by the United States. However, the process must be transparent, and he agreed with other delegations that any decision for deferral should be by way of a formal resolution.

111. On the issue of complementarity, his delegation regarded article 15 in its current form as essential.

112. **Mr. GEVORGIAN** (Russian Federation) said that his delegation was in favour of automatic jurisdiction for genocide and State consent for crimes against humanity and war crimes. It could work on the basis of article 7 *bis*.

113. As to what States had to be parties to the Statute or to have accepted the Court's jurisdiction before the Court could act, his delegation considered that there had to be preliminary agreement by the State on whose territory the crime was committed and by the custodial State. However, he was sympathetic to the attitude of the delegations that favoured preliminary agreement by a State of nationality.

114. His delegation was opposed to the idea of giving the Prosecutor *proprio motu* powers. Before a case was referred to the Court, a State would have to make a complaint. That would make it possible to remove any political pressure from the Prosecutor. His delegation was therefore opposed to article 6 (c) and article 12 as a whole.

115. As to the role of the Security Council concerning aggression, his delegation favoured option 1 for article 10 (1). With regard to deferral, his delegation found it difficult to agree with any wording that might be interpreted as modifying the obligations of States under the Charter, in particular under Chapter VII. Moreover, the introduction of any time-limit might be interpreted as affecting the Security Council's powers under Chapter VII. His delegation was prepared to seek a generally acceptable option.

116. Replying to a point made by the representative of India, he recalled that the Security Council as a body was responsible for maintaining international peace and security and that the question whether a member was or was not a party to the Statute or to any other treaty was not of vital importance, since Article 103 of the Charter would prevail. There would thus be no violation of treaty law.

117. **Mr. AREVALO** (Chile) said that his delegation was in favour of inherent jurisdiction of the Court with regard to the core crimes. It could therefore accept article 7 *bis*.

118. As far as the States that had to accept jurisdiction before the Court could act were concerned, his delegation was in favour of option 1 for article 7. The provision in article 7 *ter* would also be useful for non-parties.

119. His delegation was in favour of *proprio motu* powers for the Prosecutor and therefore supported option 1 for article 6 (c), and considered that option 1 for article 12 also provided a good basis for agreement. It could not accept option 1 for article 11 (3).

120. As to the role of the Security Council on aggression (article 10 (1), option 1), his delegation would accept whatever was agreed on the crime of aggression. With regard to deferral, option 1 for article 10 (2) provided an interesting basis on which further work could be done. He endorsed the point made by the Netherlands and New Zealand on the need for a prior resolution from the Security Council. He also supported the Belgian point that evidence had to be preserved since it was vital for the future trial.

121. **Mr. RWELAMIRA** (South Africa), speaking on behalf of his own delegation and that of the other countries of the Southern African Development Community (SADC), said that they preferred inherent jurisdiction for all the core crimes under the Court's jurisdiction. However, being aware of the concerns expressed by some delegations on the need for additional requirements of consent, the SADC would be in favour of option 1 for article 7. Option 3 was quite unacceptable.

122. There should be no opt-in mechanism for any of the core crimes, but the SADC was flexible as to the possibility of an opt-in system for treaty crimes, in particular, drug crimes and attacks on United Nations personnel.

123. The role of the Security Council was probably related to the resolution of the problems of defining the crime of aggression. The SADC was flexible as to option 1 for article 10 but was certainly against option 2. It was in favour of *proprio motu* powers for the Prosecutor and supported option 1 for article 12. The SADC was flexible as to whether article 16 on admissibility should be contained in the Statute, but consideration might be given to including it if it were redrafted.

124. **Mr. HUARAKA** (Namibia) endorsed the remarks of the previous speaker on behalf of the countries of the SADC.

125. Namibia considered that the Court should have inherent jurisdiction, at least for the core crimes, once a State had ratified the Statute.

126. With regard to acceptance of jurisdiction, his delegation was in favour of option 1 for article 7.

127. His delegation considered that the Prosecutor should be able to initiate investigations ex officio on the basis of information from any reliable source.

128. With regard to the role of the Security Council, he agreed that the Conference could not amend the Charter. Article 10 might be revisited once an appropriate definition of aggression had been found.

129. Article 16 on preliminary rulings regarding admissibility had not really been debated, and he therefore suggested that a small working group should be set up to consider it.

130. **Mr. FALL** (Guinea) said that, with regard to the exercise of jurisdiction, his delegation was in favour of option 1 for article 6 (c).

131. As to acceptance of jurisdiction, his delegation regretted that the German proposal on universal jurisdiction seemed to have been withdrawn. Its second choice was option 1 for article 7. Article 7 *bis* should be deleted, to avoid weakening the jurisdiction of the Court.

132. His delegation supported the maintenance of article 7 *ter* on acceptance of the Court's jurisdiction by non-parties.

133. He was in favour of ex officio powers for the Prosecutor under the control of the Pre-Trial Chamber, and therefore supported option 1 for article 12.

134. With regard to the role of the Security Council, his delegation supported option 1 for article 10 (1) and was opposed to option 1 for article 11 (3).

135. **Mr. LEHMANN** (Denmark) said his delegation regarded it as essential that automatic jurisdiction should be provided for in the Statute, which should not be fragmented by including opt-in or opt-out clauses. Although his delegation was not in favour of preconditions for the exercise of jurisdiction by the Court, it could accept option 1 for article 7 as a starting point.

136. His delegation supported option 1 for article 12 on the role of the Prosecutor.

137. With regard to the role of the Security Council, his delegation would prefer option 3 for article 10. The Council should not be given the power to dictate that the Court suspend proceedings in a particular case. The Court might itself consider that suspending a case would serve the interests of justice, or the Court and the Security Council might cooperate on the basis of non-binding arrangements but not through a dictate.

138. **Mr. SCHEMBRI** (Malta) said that, under current international law, all States might exercise universal criminal jurisdiction over crimes of genocide, crimes against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victim and the place where the crime was committed. However, in a spirit of compromise, his delegation was prepared to support the replacement of that concept in the Statute by the concept of automatic jurisdiction, but it could not contemplate any form of opt-in or State consent regime for any of the core crimes. For the Court to be effective and credible, State consent should be required only once, namely, when a State became a party to the Statute.

139. With regard to the Chairman's second question, his delegation supported option 1 for article 7 and was also in favour of article 7 *ter*.

140. Articles 6 and 12 referring to the independent role of the Prosecutor were, in his delegation's view, fundamental. The Court had to have an independent Prosecutor, within a system of appropriate checks and balances. A court relying exclusively on referral by the Security Council or a State party would not suffice to bring to justice those responsible for the crimes to be covered by the Statute. Option 1 for article 10 (2) would be a suitable compromise accommodating divergent views regarding the Security Council's role, but should be amended by adding that decisions under Chapter VII of the Charter should be taken only by public resolution.

141. Malta unreservedly supported the inclusion of article 15, since it believed that the principle of complementarity was essential.

142. *Mr. Mochochoko (Lesotho), Vice-Chairman, took the Chair.*

143. **Mr. IVAN** (Romania) said that in principle his delegation was in favour of universal jurisdiction but could accept automatic jurisdiction for genocide, war crimes, and crimes against humanity, and for aggression, if included.

144. With regard to the States that had to be parties to the Statute or to have accepted jurisdiction before the Court could exercise jurisdiction, his delegation supported option 1 for article 7, and article 7 *ter* regarding acceptance by non-parties.

145. His delegation was in favour of giving the Prosecutor ex officio power to initiate an investigation and supported article 6 (c). Option 1 for article 12, as well as the preliminary rulings regarding admissibility in article 16, would provide the necessary safeguards.

146. With regard to the role of the Security Council, his delegation accepted the Council's right to refer a situation to the Court and to request the deferral of proceedings, pursuant to Chapter VII of the Charter.

147. **Mr. MASUKU** (Swaziland) said that his delegation associated itself with the statement made by the representative of South Africa on behalf of the SADC countries.

148. Replying to the Chairman's questions, he said that his delegation considered that option 1 for article 6 (c) relating to the role of the Prosecutor should form part of the Statute.

149. His delegation was also in favour of the Court's having automatic jurisdiction in respect of the three core crimes, which could be supplemented by an opt-in mechanism for treaty crimes.

150. With regard to article 7 on acceptance of jurisdiction, his delegation considered that option 1 was acceptable.

151. Recognizing the role of the Security Council under the Charter, his delegation was in favour of option 1 for article 10 (1) and (2).

152. With regard to the role of the Prosecutor, his delegation considered that option 1 for article 12 was preferable, since it made provision for all necessary safeguards.

153. **Mr. OUMAR MAIGA** (Mali) said that ratification of the Statute by a State should signify automatic acceptance of the Court's jurisdiction for genocide, crimes against humanity and war crimes. His delegation had therefore supported the German proposal, which, unfortunately, did not figure in the discussion paper. His delegation was unable to accept article 7 *bis*.

154. The Prosecutor should have the power to initiate proceedings *proprio motu*; his delegation therefore supported option 1 for article 6 and option 2 for article 11.

155. He believed that it was necessary to specify the number of times that the Court might defer proceedings at the request of the Security Council. Moreover it was also important to ensure that evidence was preserved and victims protected during the deferral period.

156. His delegation supported the Syrian proposal to delete article 16.

157. **Mr. AL HUSSEIN** (Jordan) said that his delegation was in favour of automatic jurisdiction for all the core crimes under article 7, but did not accept the State consent regime suggested in the note to article 7 and in article 7 *bis*. Moreover, it considered that, if the State consent regime were adopted, contrary to the preference of many delegations, that might have fatal consequences for the Court that the Conference was trying to create.

158. With regard to the Chairman's second question, his delegation considered that one or more of the four States listed in option 1 for article 7 should be a party to the Statute before the Court could exercise its jurisdiction by way of the complementarity mechanism envisaged in article 15. His delegation supported article 7 *ter*.

159. His delegation strongly supported option 1 for article 12 referring to the *proprio motu* power of the Prosecutor to initiate proceedings and believed the safeguards contained therein were sufficient, in conjunction with those provided for in articles 47 and 48 of the draft Statute.

160. With regard to the role of the Security Council, his delegation was in favour of option 1 for article 10 (2).

161. He had two further comments on complementarity. It was essential to include article 15 as currently drafted to ensure that the Court would function effectively. He welcomed article 16 but considered that it required some redrafting in order to gain widespread acceptance.

162. **Mr. Seung-hoh CHOI** (Republic of Korea) said that his delegation strongly believed that the Court should have automatic jurisdiction over the core crimes. There was no need for an opt-in mechanism, and article 7 *bis* was therefore not acceptable to his delegation.

163. Regarding the acceptance of jurisdiction by non-parties, his delegation supported article 7 *ter* but thought that the text should be modified to cover obligations other than those under Part 9 of the Statute. His delegation was ready to cooperate in that work.

164. As to the preconditions for the exercise of jurisdiction, his delegation was of course in favour of option 1 for article 7 (1), which it had sponsored. That option was a compromise formulated to bridge gaps between the proponents of universal jurisdiction and those in favour of State consent in each particular case.

165. His delegation supported the *proprio motu* power for the Prosecutor to initiate proceedings, subject to appropriate safeguards, as provided in article 12.

166. He could accept either option 1 or 2 based on the Singaporean proposals with regard to the role of the Security Council, in recognition of the Council's primary responsibility for the maintenance of international peace and security.

167. In connection with referral by the Security Council, his delegation considered that the obligations imposed on States parties to supply relevant information needed to be revised.

168. His delegation firmly believed that the issue of complementarity should not be re-opened.

169. **Mr. SOARES da GAMA** (Guinea-Bissau) said that his delegation supported option 1 for article 6 concerning automatic jurisdiction with respect to genocide, crimes against humanity and war crimes. It would consider the inclusion of aggression once a satisfactory definition had been found.

170. His delegation was in favour of option 1 for article 7.

171. He considered that the Prosecutor should be able to act *proprio motu*, so that option 1 for article 12 was the most appropriate.

172. With regard to the role of the Security Council, his delegation could accept option 1 for article 10; with regard to deferral, option 2 might be used as a basis for compromise.

173. **Ms. KASYANJU** (United Republic of Tanzania) said that she endorsed the views expressed by the representative of South Africa on behalf of the SADC countries.

174. With regard to exercise of jurisdiction, her delegation strongly supported option 1 for article 6 (c), in conjunction with the safeguards provided in article 12.

175. Her delegation supported universal jurisdiction for all the core crimes but as a compromise could accept automatic jurisdiction. It considered that an "opt-in/opt-out" regime would undermine the Court's effectiveness and therefore supported option 1 for article 7. She would support articles 7 *bis*, 7 *ter* and 8.

176. With regard to the role of the Security Council, her delegation supported option 1 for article 10 (1). On article 10 (2) on deferral, its preference was for option 3 but it was willing to explore the matter further.

177. Her delegation supported option 2 for article 11 (3). With regard to article 12 on the Prosecutor, it was in favour of option 1. It continued to support the provisions of article 15 regarding complementarity.

178. In the light of its strong support for proposals regarding article 17, it saw no need for article 16.

179. **Ms. BETANCOURT** (Venezuela) said that, for the sake of consensus, Venezuela was prepared to agree that the Court should have automatic jurisdiction in respect of all the crimes under article 5. Article 7 *bis* was therefore unnecessary. She did not think that treaty crimes should be included in the Statute.

180. With regard to the acceptance of jurisdiction, her delegation could accept option 1 for article 7 and agreed to the inclusion of article 7 *ter*. The Prosecutor should be enabled to initiate proceedings ex officio, subject to the Pre-Trial Chamber mechanisms. It therefore accepted article 12, and would support option 2 for article 6 (c).

181. As to the role of the Security Council, she said that the Court should be an independent body with clearly defined relations with the Council. Her delegation could accept a reference in the Statute to the Council's role only if the crime of aggression were to be included within the Court's jurisdiction; she therefore supported option 1 for article 10 (1). Article 6 (b) should be worded accordingly. If the Conference decided to include a deferral clause in the Statute, it should stipulate that any decision by the Council should relate only to an act of aggression.

182. Her delegation considered that the principle of complementarity had to be reflected in the Statute and therefore supported article 15 as drafted in the discussion paper.

183. **Mr. KAUL** (Germany) said, with regard to acceptance of jurisdiction, that his delegation was dismayed that its proposal on universal jurisdiction had not been put forward as an option in the discussion paper. It still believed that the universal jurisdiction approach was legally sound. The Conference might be criticized for not making that the basis for the Court's jurisdiction.

184. With regard to the proposals for jurisdiction over the core crimes, his delegation considered that neither the State consent regime nor the opt-in proposal outlined in article 7 *bis* would be acceptable to participants, so far as all or any of the three core crimes were concerned. Automatic jurisdiction with regard to those crimes therefore had to be considered.

185. His delegation supported option 1 for article 7. The membership of one or more of the four States mentioned in that option would be sufficient to enable the Court to exercise its jurisdiction.

186. With regard to the *proprio motu* power of the Prosecutor to initiate proceedings, he stressed that option 1 for article 12 provided the important safeguard that the Prosecutor would be under the control of the Pre-Trial Chamber. However, unless the Prosecutor had the right to initiate investigations *proprio motu*, the Court's jurisdiction would be impaired. He therefore appealed to delegations to support option 1. Moreover, there were other safeguards, including the threshold clauses for the various crimes, and the provisions of article 16. Incidentally, his delegation could not accept the latter article in its current form since it constituted an attempt to establish additional procedural hurdles at the start of investigations. Furthermore, some of the points made by delegations in informal consultations had not yet been taken into account. His delegation would participate in any informal efforts to help improve article 16, perhaps combining it with article 17, which would provide yet another safeguard with regard to the Prosecutor.

187. As to the role of the Security Council, he said that article 10 was a very delicately balanced provision that safeguarded the independence of the Court and reconciled it with the Council's existing prerogatives. If aggression were included, paragraph 1 of that article would be necessary. His delegation supported option 1 for paragraph 2.

The meeting rose at 1 p.m.